No. 86-341

In The
Supreme Court of the United States
October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, *et al.*,
Appellees.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE P. DANIEL COYNE TO DISMISS OR AFFIRM

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
207-289-3661

Attorneys for Appellee
P. Daniel Coyne, Director,
Bureau of Labor Standards,
Maine Department of Labor

October 15, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether a state statute that imposes a one-time obligation to provide severance pay under certain circumstances requires employers to create a private "employee benefit plan" within the meaning of ERISA and is therefore preempted by 29 U.S.C. § 1144(a).

2. Whether a state statute that applies alike to union and non-union workers, that does not interfere with any of the economic self-help weapons available to combatants in a labor dispute, and that imposes certain substantive terms on the employer-employee relationship is preempted by the National Labor Relations Act.

LIST OF PARTIES

The parties are as listed in appellant's jurisdictional statement with one exception: Marvin W. Ewing, listed as appellee in the caption of the jurisdictional statement, has resigned as the Director of Maine's Bureau of Labor Standards and has been succeeded by P. Daniel Coyne. Pursuant to Rule 40.3, Mr. Coyne has been automatically substituted as appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 86-341

In The
Supreme Court of the United States
October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, *et al.*,
Appellees.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE P. DANIEL COYNE TO DISMISS OR AFFIRM

Appellee P. Daniel Coyne, Director of the Maine Bureau of Labor Standards, moves to dismiss this appeal or, in the alternative, to affirm the judgment of the Maine Supreme Judicial Court on the ground that this appeal does not present a substantial federal question and does not warrant plenary review.

STATE STATUTE INVOLVED

The Maine severance pay statute, which is codified at 26 M.R.S.A. § 625-B (Supp. 1985), is designed to ease the severe social and economic shock created when a major

employer decides to cease its operations, close its plant, and put its employees out of work.[1] The statute applies to employers who have more than 100 workers and who close their plants or relocate more than 100 miles. 26 M.R.S.A. § 625-B(1)(A), (F), (G). Only employees who have worked at a plant for three years or more are entitled to severance pay, and there is no liability under the statute if an employee is covered by an express contract on the subject of severance pay or if the plant closing results from bankruptcy or natural calamity. 26 M.R.S.A. § 625-B(3)(A), (B). (D). *See* § 625-B(1)(E). The statute requires that each eligible employee be paid one week of severance pay for each year the employee worked at the plant. 26 M.R.S.A. § 625-B(2).

STATEMENT OF THE CASE

Prior to May 1981, the Fort Halifax Packing Company ("Fort Halifax") operated a poultry processing and packaging plant that employed more than 100 employees in Winslow, Maine. Fort Halifax began operating the Winslow plant in 1972, when it purchased the plant and certain other assets from the Ralston Purina Company. The Winslow plant had previously been operated by Ralston Purina from 1961 through 1972 and by the CMT Company, Inc. prior to 1961. Thus, as of May 1981, a number

[1] *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974) (discussing predecessor of current statute).

of Fort Halifax employees had worked continuously at the Winslow processing plant for 20 years or more.

On May 23, 1981 Fort Halifax ceased all processing at the Winslow plant and laid off almost all of its employees. The existing collective bargaining agreement between Fort Halifax and the union which represented its production employees contained no provision for severance pay. There was also no contract or agreement on the subject of severance pay between Fort Halifax and its nonunion supervisory and clerical personnel. Nevertheless, Fort Halifax did not provide severance pay to its employees as required by 26 M.R.S.A. § 625-B.

As of May 1981 Fort Halifax was a wholly-owned subsidiary of Corbett Enterprises, Inc., a holding company whose headquarters are located in West Hartford, Connecticut. Although Fort Halifax employees were covered by two retirement plans maintained by Corbett Enterprises,[2] neither of those plans contained any provision for severance benefits. Moreover, benefits paid by the Corbett retirement plans commence only when an employee dies or reaches retirement age, and no such benefits were paid to Fort Halifax employees as a result of the closing of the Winslow plant.

[2] The first of these retirement plans was for production employees. The second was for sales, administrative, and clerical employees. Both plans provide modest retirement benefits, which are increased if an employee chose to contribute additional amounts while working. At the time the plant closed, employees who made such voluntary contributions were offered the opportunity to request the return of their own contributions. They were not entitled to obtain any amounts contributed by Fort Halifax.

On November 2, 1981 the Director of Maine's Bureau of Labor commenced an action against Fort Halifax to enforce the severance pay law. Fort Halifax thereafter raised, *inter alia*, the defenses of ERISA and NLRA preemption.[3] These defenses were rejected by the trial court and judgment was entered against Fort Halifax on May 2, 1985. Fort Halifax thereafter appealed to the Maine Supreme Judicial Court, which rejected Fort Halifax's preemption claims and affirmed the judgment with minor modifications in an opinion issued on June 2, 1986.

ARGUMENT

Appellant's Preemption Claims Were Correctly Rejected Below and Do Not Warrant Plenary Review.

On this appeal Fort Halifax primarily contends that the Maine severance pay law is preempted by section 514 (a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). That section "preempts state laws only insofar as they relate to [employee benefit] plans covered by ERISA." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983). Because the facts in this case and the relevant statutory language demonstrate that the Maine severance pay law does not relate to an ERISA-covered employee benefit plan, Fort Halifax's claim of ERISA preemption is untenable. Its alternative contention—that the state severance pay law is preempted by the National Labor Relations Act (NLRA)—is foreclosed by this Court's 1985 decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985). As a result, this appeal should be dismissed for want of a substantial federal question.

[3] The defense of ERISA preemption was raised in the answer filed by Fort Halifax. The defense of NLRA preemption was not raised in the answer but was subsequently raised in the lower court proceedings and was ruled upon by the trial court and the Maine Supreme Judicial Court. See Appendix to the Jurisdictional Statement at A9-A14, A23.

1. ERISA Preemption

The doctrine of preemption is based upon the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Preemption exists only when there is an actual conflict between state and federal regulations or when Congress has specifically intended to displace state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-42 (1963). This Court has emphasized that "[p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

In this case Fort Halifax does not argue that there is any conflict between ERISA and the Maine severance pay law. Instead, it contends that the severance pay law is nullified by the express preemption provision contained in 29 U.S.C. § 1144(a). This contention, however, is in-

consistent with the relevant statutory language and is contrary to the legislative history and the underlying policy of the ERISA statute.

The entire focus of ERISA is on privately-created and privately-administered employee benefit plans. Under the statute such plans are divided into two categories: "employee pension benefit plans" and "employee welfare benefit plans." *See* 29 U.S.C. § 1002(1), (2), (3).[4] The statute creates detailed reporting, disclosure, and fiduciary responsibilities that are applicable to both pension and welfare benefit plans. 29 U.S.C. §§ 1021-31, 1101-14. In addition, it mandates specific participation, vesting, and fiduciary requirements for pension plans and establishes a system of insurance to protect the rights of pensioners in the event of a pension plan termination. 29 U.S.C. §§ 1051-86, 1301-68. The overall intent of this legislation was to prevent abuses in privately-administered employee benefit plans, *Massachusetts Mutual Life Ins. Co. v. Russell*, 105 S.Ct. 3085. 3090 n.8 (1985); *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982) (en banc), and to ensure that upon retirement, workers actually receive the pension benefits they have been promised. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374-75 (1980).

Like the ERISA statute itself, ERISA's preemption section focuses on private employee benefit plans. Specifically, it preempts "any and all State laws insofar as

---

[4] "Employee welfare benefit plans" are those which provide employee fringe benefits other than pension or retirement benefits. 29 U.S.C. § 1002(1).

they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). An employee benefit plan covered by ERISA is one which is "established or maintained by an employer or by an employee organization." 29 U.S.C. §§ 1002(1), (2), 1003(a). Thus, although severance pay may be among the benefits provided by an ERISA-covered plan, this does not mean that all state laws relating to severance pay are automatically preempted. Instead, ERISA only preempts state laws that relate to private employee benefit plans, and it does not preempt such state laws in their entirety but only "insofar as" those laws actually relate to ERISA-covered plans. 29 U.S.C. § 1144(a).

The legislative history demonstrates that the preemption section was intended to eliminate "the threat of conflicting a inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29197, 29933 (1974) (statements of Rep. Dent and Sen. Williams). Toward this end Congress decided to preempt even state laws that were consistent with ERISA, thus effecting "the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29942 (1974) (statement of Sen. Javits). *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 99-100 and n.20.

In this case, Fort Halifax did not maintain any employee welfare benefit plan of any kind. The only private employee benefit plans established or maintained by Fort Halifax were its pension plans, and those plans were not altered or affected in any way by the Maine severance pay law. As a result, the Maine severance pay law does not relate to any private employee benefit plan and does not invade the area of exclusive federal regulation under ERISA.

Indeed, Fort Halifax does not argue in this case that the Maine severance pay law relates to its existing pension plans. Instead, it premises its preemption claim upon the theory that the severance pay law itself creates an ERISA-covered employee benefit plan by requiring employers to pay severance pay under certain circumstances. *See* Jurisdictional Statement at 7-8.[5] For numerous reasons, this argument cannot withstand scrutiny.

First, it completely ignores ERISA's focus on privately administered employee benefit plans. The Maine severance pay law is not a private employee benefit plan established by an employer or union; it is an independent statutory obligation established by the State. This point is crucial because the primary purpose of ERISA was to prevent abuses in privately-administered plans. ***E.g., Massachusetts Mutual Life Ins. Co. v. Russell***, 105 S.Ct. at 3090 n.8 ("the crucible of congressional concern was misuse and mismanagement of plan assets"); *Donovan v. Dillingham*, 688 F.2d at 1370 ("Congress enacted ERISA to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans"). No such potential for abuse exists with respect to a statutory obligation enforced by a state agency.

Second, the Maine severance pay law lacks another essential element of an ERISA plan in that it does not create an ongoing program of benefits but instead imposes a one-time obligation in the event of a plant shutdown.

---

[5] Ft. Halifax argues that the severance pay law gives employers the option of either accepting the statutory terms or selecting other terms. *(Id.)*. This ignores that employers can also contract with their employees to eliminate severance pay entirely.

While Congress did not define what it meant by a "plan, fund, or program" within the meaning of 29 U.S.C. §§ 1002(1) and (2), the overall structure of the ERISA statute demonstrates that there must at least be an ongoing program of benefits in order for the reporting, disclosure, and fiduciary requirements of ERISA to apply. Thus, a one-time payment of benefits is not sufficient to constitute an ERISA plan. *Martori Bros. Distributors v. Jones-Massengale*, 781 F.2d 1349, 1358 (9th Cir. 1986), *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986). ("It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan"). *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). Accordingly, the Maine severance pay law does not qualify as an ERISA plan because it is a one-time statutory assessment that applies only in the event of a plant closing; it does not require employers to provide severance pay at any other time, and it does not create an ongoing benefit program.

In addition, the theory advanced by Fort Halifax would lead to highly anomalous and illogical results. If (as Fort Halifax suggests) the severance pay law must be deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even with respect to those employers who have no pension plan or employee benefit plan of any kind. Thus, the logical result of Fort Halifax's argument is that an employer which has no ERISA plan and which is therefore not subject in any way to regulation under ERISA would nevertheless be able to take advantage of ERISA preemption to escape its obligations under the Maine severance pay law. This makes no sense. *See Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195,

198 (1st Cir. 1986) (Aldrich, J., concurring).[6] The correct view, as the Ninth Circuit stated in *California Hospital Assn. v. Henning*, 770 F.2d 856, 861 (9th Cir. 1985), *amended on other grounds*, 783 F.2d 946 (9th Cir. 1986), *cert. denied*, 106 S.Ct. 3273 (1986), is that "federal exclusivity [under ERISA] is a corollary of regulatory coverage, not an independent statutory goal."

As part of its argument that this appeal merits plenary consideration, Fort Halifax suggests that the decision below cannot be reconciled with *Stanadrd Oil Co. v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). However, the *Agsalud* case is distinguishable on two fundamental grounds. First, the Hawaii statute at issue in *Agsalud* required employers to establish a comprehensive health care plan; this plainly constituted an ongoing benefit program subject to ERISA. In contrast, as noted above, the Maine severance pay law merely imposes a one-time payment in the event of a plant closing; this does not require employers to establish or maintain a "plan, fund, or pro-

---

[6] Like this case, *Marcal* involved an employer's challenge to the Maine severance pay law based on ERISA preemption. Marcal, which had no employee benefit plan of any kind, adopted the argument pursued by Fort Halifax on this appeal: *i.e.*, that the Maine law was preempted even though it did not relate to any existing ERISA plan because the law itself constituted an ERISA-covered plan. In the First Circuit, two judges held that the case had properly been dismissed under the doctrine of abstention. Judge Aldrich disagreed with his colleagues that abstention was appropriate but nevertheless concurred in the result, stating: "I see no merit whatever in appellant's contention that ERISA preempts even when an employer has no plan." He went on to state that since Marcal was not subject to ERISA, it could not use ERISA to avoid the severance pay law: ["A]ppellant cannot have it both ways: no ERISA, and no State statute." 790 F.2d at 198.

gram" within the meaning of 29 U.S.C. § 1002(1) and (2). *See Martori Bros. Distributors v. James-Massengale*, 781 F.2d at 1358. Second, the Hawaii statute in *Agsalud* also plainly related to an ERISA-covered plan in that it imposed certain specific additional requirements on the employer's existing ERISA plan. *See* 442 F.Supp. at 696. In the case at bar, however, the Maine severance pay law does not in any way alter or affect the rights or obligations of Fort Halifax under its existing pension plan. As a result, it does not invade the area regulated by ERISA and is not preempted.[7]

Fort Halifax also suggests that the decision below is in "direct conflict" with *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986); and *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986). See Jurisdictional Statement at 14. No such conflict exists. *Metropolitan Life* involved a state statute which required ERISA-covered plans to provide certain specific benefits. The Maine severance pay law, however, does not require an employer who has established an ERISA-covered plan to include any provision in that plan for severance pay. Similarly, *Gilbert* and *Holland* both involved employers with established severance pay

---

[7] The issue of whether the severance pay law would be preempted where an employer has an existing ERISA-covered severance pay plan is not presented by this case. As the Maine Supreme Judicial Court pointed out, however, the Maine severance pay law is not applicable when there is an express contractual arrangement on the subject of severance pay, 26 M.R.S.A. § 625-B(3)(B), and this largely eliminates any possibility of overlap between ERISA and the severance pay law.

policies that were found to constitute private ERISA-covered plans. Under those circumstances, the employees' state law claims were premepted because they related to an ERISA-covered plan, and the employees were relegated to their remedies under ERISA. In the instant case, however, the employees' claims under the Maine severance pay law do not relate to any private ERISA-covered plan. In addition, the employees in this case cannot be relegated to their remedies under ERISA because no ERISA remedies are available. Accordingly, ERISA preemption is inapplicable.[8]

In sum, contrary to the argument made by Fort Halifax, "the preemptive scope of ERISA is neither all-encompassing . . . nor unlimited." *Rebaldo v. Cuomo,* 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied,* 105 S.Ct. 2702 (1985) (citations omitted). The Maine Supreme Judicial Court

---

[8] Although this issue was not reached by the Maine Supreme Judicial Court, we submit that even if the Maine severance pay law were somehow found to relate to a private employee benefit plan covered by ERISA, it would nevertheless escape preemption pursuant to 29 U.S.C. § 1003(b)(3). That section provides that ERISA does not cover employee benefit plans maintained solely for the purpose of complying with applicable unemployment compensation laws. The legislative history of the severance pay statute establishes that it is a form of unemployment compensation law. *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.,* 320 A.2d at 255 ("while the most common form of unemployment relief—the payment of benefits—follows the onset of the condition, not all legislative attempts to deal with these problems must take effect after the fact"). And while the severance pay law is not a traditional form of unemployment compensation law, this would not disqualify it from the exception to ERISA preemption under § 1003(b)(3). *See Metropolitan Life Insurance Co. v. Massachusetts,* 105 S.Ct. at 2390 (neither ERISA statute nor its legislative history draw any distinction between "traditional" and innovative insurance laws for purposes of the insurance exception to ERISA preemption).

correctly rejected Fort Halifax's ERISA preemption claim, and this result is not in conflict with the prior decisions of this Court or of the various federal circuits.

2. NLRA Preemption

Fort Halifax also contends that the Maine severance pay law impermissibly interferes with the free play of collective bargaining and is therefore preempted by the NLRA.[9]

However, this claim is foreclosed by the decision in *Metropolitan Life Insurance Co. v. Massachusetts,* 105 S.Ct. 2380, 2393-99 (1985), which rejected a virtually identical argument and ruled that the NLRA does not preempt a state from imposing substantive terms on parties to labor agreements. Indeed, almost the entire portion of Fort Halifax's jurisdictional statement that concerns NLRA preemption is devoted to a vain attempt to distinguish the *Metropolitan Life* case.

Like the Massachusetts statute at issue in *Metropolitan Life,* the Maine severance pay law is not addressed to the collective bargaining process. It merely requires that in-

---

[9] This argument seeks to take advantage of the NLRA preemption doctrine derived from such cases as *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 140 (1976). A second form of NLRA preemption is derived from another line of cases beginning with *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The *Garmon* preemption doctrine is designed to protect the primary jurisdiction of the National Labor Relations Board. While the *Garmon* doctrine was raised below, Fort Halifax does not claim on this appeal that Maine is trying to regulate conduct that is within the jurisdiction of the National Labor Relations Board. In any event, such a claim would be untenable. *See, e.g., Belknap, Inc. v. Hale,* 463 U.S. 491 (1983); *Sears, Roebuck and Co. v. San Diego District Council of Carpenters,* 436 U.S. 180 (1978).

dividual workers be given a specific benefit under certain circumstances. As a result, it fails within the category of state legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life*. *See* 105 S.Ct. at 2397. While Fort Halifax contends that the severance pay law strengthens the hand of the union during collective bargaining, the same can be said for any minimum labor standard that guarantees employees a benefit that they no longer need to seek at the bargaining table. Nevertheless, such minimum labor standards were upheld in *Metropolitan Life*. NLRA preemption only applies when a state law impermissibly regulates the economic self-help remedies available to combatants in a labor dispute. *See Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. at 2394-95; *Belknap, Inc. v. Hale*, 463 U.S. at 499. Since the Maine severance pay law does not regulate or interfere with any of the economic weapons which Congress left to employers and employees, it is not preempted. *Compare Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. at 146-47.[10]

In fact, the Maine severance pay law is significantly less intrusive than the Massachusetts mandatory benefit law upheld in *Metropolitan Life* because it preserves the

---

[10] Fort Halifax also attempts to derive support from NLRA § 8(d), 29 U.S.C. § 158(d) (Jurisdictional Statement at 10). However, that section merely provides that an employer is not obliged to agree to any particular contract term during the collective bargaining process. Neither that section—nor the corollary principle that the NLRB cannot require an employer to accept a specific contract term as a remedy for a § 8(d) violation, *see H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)—prevents a state from regulating issues subject to collective bargaining by imposing substantive terms on the employment relationship. *See Metropolitan Life*, 105 S.Ct. at 2394, 2397, 2398-99; *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978).

freedom of employers and employees to contract on the subject of severance pay. *See* 26 M.R.S.A. § 625-B(3)(B). Since the law thus defers to any severance pay contract reached between the parties, it does not "prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." *Teamsters v. Oliver*, 358 U.S. 283, 295 (1959). *See Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania*, 461 Pa. 68, 334 A.2d 636, 640 (Pa. 1975), *appeal dismissed for want of a substantial federal question*, 423 U.S. 806 (1975).

The second basis on which Fort Halifax attempts to distinguish *Metropolitan Life* is its claim that the Maine severance pay law does not affect union and non-union employees equally. Jurisdictional Statement at 12. This is flatly incorrect. The severance pay law draws absolutely no distinction between union and non-union employees. As demonstrated by the instant case, where at least 10 non-union supervisors were awarded severance pay in the Superior Court judgment,[11] the severance pay requires that both union and non-union employees receive severance pay in the event of a major plant closing.

Fort Halifax apparently premises its claim that the law does not treat union and non-union workers alike on the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B). It argues that employers with non-union workers can "easily" avoid their obligations under the severance pay law (by requiring their employees to contract

---

[11] These ten are the "administrative employees" referred to in the Superior Court's May 2, 1985 decision at A25.

on this issue) and that the law therefore discriminates against unionized employers.[12] The short answer to this claim is that a state law which is even-handed on its face does not become "discriminatory" because it can more easily be avoided in some circumstances than others. And to the extent that Fort Halifax's argument is premised on the truism that non-union employees generally have less bargaining power than union employees, this situation is not peculiar to the Maine severance pay law but applies to all employment-related issues.

Finally, notwithstanding Fort Halifax's argument to the contrary (Jurisdictional Statement at 13), the Maine severance pay law must be found to be a valid exercise of the police power, under which states "possess broad authority . . . to regulate the employment relationship to protect workers within the state." *Metropolitan Life,* 105 S.Ct. at 2398, quoting *DeCanas v. Bica,* 424 U.S. 351, 356 (1976). *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.,* 320 A.2d at 254-55.

Thus, all of Fort Halifax's purported distinctions between this case and the principles laid down in *Metropolitan Life* are untenable. In addition, if Fort Halifax's argument were accepted, it would mean that the NLRA forecloses virtually all state regulation of collective bargaining issues. This is squarely contrary to the prior decisions of this Court establishing that the NLRA does not preempt "all state regulatory power with respect to those issues . . .

---

[12] If, as Fort Halifax claims, it is so easy for employers to avoid the severance pay law with respect to non-union employees, one wonders why Fort Halifax did not do so with respect to its own non-union employees.

that may be the subject of collective bargaining." *E.g., Malone v. White Motor Co.,* 435 U.S. at 504-05. *See Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

CONCLUSION

This appeal does not merit plenary consideration and should be dismissed for want of a substantial federal question.

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
(Counsel of Record)
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
207-289-3661

Attorneys for Appellee
P. Daniel Coyne, Director,
Bureau of Labor Standards,
Maine Department of Labor

Dated: Augusta, Maine
October 15, 1986